

No. 22-7163

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**In the United States Court of Appeals  
for the District of Columbia Circuit**

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DISTRICT OF COLUMBIA,  
PLAINTIFF-APPELLEE

*v.*

EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION;  
ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; BP P.L.C.;  
BP AMERICA INC.; CHEVRON CORPORATION; CHEVRON U.S.A. INC.,  
DEFENDANTS-APPELLANTS

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA (CIV. NO. 20-1932)  
(THE HONORABLE TIMOTHY J. KELLY, J.)*

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**MOTION OF APPELLANTS FOR AN EMERGENCY STAY  
OF THE REMAND ORDER PENDING APPEAL**

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## INTRODUCTION

Defendants-Appellants move for a stay of the execution of the district court's remand order until this Court resolves this appeal from that order. In addition, defendants move for an immediate administrative stay of the remand order to allow the Court to consider whether a longer stay is warranted. The district court denied defendants' motion for a stay of the remand order on December 20, 2022. Absent a stay, the clerk of the district court will issue a certified copy of the remand order, which will return jurisdiction to the Superior Court of the District of Columbia, as early as January 3, 2023. Counsel for plaintiff-appellee, the District of Columbia, has informed counsel for defendants that the District consents to the entry of the administrative stay. The parties propose that the District's response to this motion be due on January 13 and the defendants' reply be due on January 20.

A stay of the remand order pending appeal is amply warranted here. In this case, the District of Columbia seeks redress for injuries allegedly caused by the effect of interstate and international greenhouse-gas emissions on the global climate. The question before this Court is whether the case should proceed in local or federal court. That question involves several substantial subsidiary questions, including whether the putative local-law claims asserted in the complaint arise under federal law and, if so, whether they are removable from local to federal court. Those questions are issues of first impression in this circuit that warrant a stay. In addition, those same questions have been

presented to the Supreme Court in the petition for a writ of certiorari in *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550, and the Supreme Court has invited the Solicitor General to file a brief expressing the views of the United States on those questions.

The Supreme Court's interest in the questions presented in *Suncor* (and in this case) is unsurprising. There is currently a conflict among the courts of appeals on the threshold question whether federal common law applies to claims seeking redress for injuries allegedly caused by global climate change. The Second Circuit held in a similar climate-change-related case that "suit[s] over global greenhouse gas emissions" "must be brought under federal common law." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91, 95 (2021). The Tenth Circuit held to the contrary in *Suncor*, as did the First, Fourth, and Ninth Circuits in similar climate-change cases. There is also a conflict among the courts of appeals on the related question whether a district court has federal-question jurisdiction over claims necessarily and exclusively governed by federal common law but labeled as arising under state law.

The Supreme Court's decision to call for the views of the Solicitor General in *Suncor* shows that there is a significant likelihood the Court will grant the petition in that case. In light of that development, there is little reason for the parties here to proceed now in the D.C. Superior Court when the Supreme Court could soon definitively hold that removal in these cases was proper—

particularly when this Court has not even had the opportunity to consider the questions in *Suncor*. In addition, this case also raises other substantial questions of federal jurisdiction, including under the federal-officer removal statute.

The balance of the equities strongly favors a stay pending appeal. Absent a stay, the parties will be required to engage in duplicative litigation in federal and local courts that may significantly harm defendants' appellate rights. And given the nature of the District's claims, the public interests involved, and the judicial resources that will be wasted if a stay is not granted, the balance of harms tilts decidedly in defendants' favor. A stay of the remand order pending appeal is therefore warranted.

### STATEMENT OF FACTS

1. Plaintiff-appellee is the District of Columbia; defendants-appellants are Exxon Mobil Corporation; ExxonMobil Oil Corporation; Shell plc (formerly known as Royal Dutch Shell plc); Shell USA, Inc. (formerly known as Shell Oil Company); BP p.l.c.; BP America Inc.; Chevron Corporation; and Chevron U.S.A. Inc. D. Ct. Dkt. 1-14, at 1.

In June 2020, the District filed a complaint against defendants in D.C. Superior Court, claiming violations of the D.C. Consumer Protection Procedures Act, D.C. Code § 28-3901 *et seq.* D. Ct. Dkt. 1-14, at 67-78. The complaint alleges that defendants' production, sale, and promotion of fossil fuels have



contributed to climate change and caused wide-ranging harm to the District, its citizens, and fossil-fuel consumers. *Id.* at 1-4, 42-44. The District also alleges climate-related harms, including heatwaves, rising sea levels, and flooding. *Id.* at 43-44. The District seeks damages for injuries stemming from these alleged climate-related harms and further seeks injunctive relief, restitution, civil penalties, and other equitable relief. *Id.* at 77-78; *see* D.C. Code § 28-3909(a)-(b).

2. Defendants removed this action to federal court. *See* D. Ct. Dkt. 1. Among other grounds, defendants asserted that the district court had federal-question jurisdiction because federal common law necessarily governs the District's claims. *See id.* at 21-27; 28 U.S.C. § 1331. Defendants explained that the claims implicate three uniquely federal interests that require the application of federal common law: namely, transboundary pollution, navigable waters of the United States, and international affairs and commerce. *See* D. Ct. Dkt. 1, at 21. While the District styled the complaint as alleging only local-law claims, defendants contended that the District could not plead around the complaint's focus on climate-change-related harms. *See id.* at 25. Defendants further argued that, even if the claims did not directly arise under federal law, they necessarily raised disputed federal issues and thus are removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005). *See* D. Ct. Dkt. 1, at 12.

Defendants also argued that removal is appropriate under the federal-officer removal statute, 28 U.S.C. § 1442, citing several examples of activities taken at the direction of federal officers. *See* D. Ct. Dkt. 1, at 30-48. Defendants noted that they had entered into supply agreements with the armed forces to produce special fuels, including high-octane aviation fuel. *Id.* at 32-36. In addition, defendants have long produced oil and gas belonging to the federal government on the Outer Continental Shelf pursuant to governmental leases; those leases gave the government control over various aspects of defendants' operations, including approval of exploration and production plans, regulation of extraction rates, and a right of first refusal during wartime to purchase all oil, gas, and minerals extracted. *Id.* at 38-44. Some defendants also acted under federal officers in producing oil and operating infrastructure for the Strategic Petroleum Reserve. *Id.* at 44-47. Defendants separately asserted that removal is permissible under the Outer Continental Shelf Lands Act, federal-enclave jurisdiction, diversity jurisdiction, and the Class Action Fairness Act. *Id.* at 27-30, 48-61.

3. The District moved to remand the case to D.C. Superior Court, and the district court granted the motion on November 12, 2022. *See* App., *infra*, 1a. In so doing, the court acknowledged defendants' "[f]air" assertion that "the District's claims 'implicate' three uniquely federal interests: interstate pollution, the navigable waters of the United States, and foreign affairs."

*Id.* at 6a. The court also noted that “the Supreme Court has recognized ‘few and restricted’ areas of federal common law to protect ‘uniquely federal interests.’” *Id.* at 5a. The court nevertheless held that federal common law does not apply to this case because defendants did not identify a significant conflict between the District’s claims and federal interests. *Id.* at 6a. As a secondary matter, the court found removal improper in light of the well-pleaded complaint rule. *Id.* at 9a-10a.

The district court also rejected defendants’ arguments for removal under the federal-officer removal statute. The court accepted that “the injuries the District alleges—in short, climate change—eventually trace back to fossil fuel usage.” App., *infra*, 17a-18a. But the court nevertheless declined to grant removal on federal-officer grounds because it did not find “a sufficient nexus between any action defendants may have taken under federal direction and the alleged false advertising that gave rise to the District’s claims.” *Id.* at 18a. The district court also rejected defendants’ other grounds for removal.

4. On December 20, 2022, the district court denied defendants’ motion to stay execution of the remand order pending appeal, but stayed the remand order through January 3, 2023, to allow defendants to seek relief from this Court. *See* App., *infra*, 25a-27a.

## ARGUMENT

Federal courts have inherent authority to stay the enforcement of an order pending appeal. *See Nken v. Holder*, 556 U.S. 418, 421 (2009). Courts assess whether to issue a stay pending appeal by considering four traditional factors: “(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at 434 (citation omitted). Here, each factor supports a stay of the remand order pending review by this Court.

### A. Defendants Are Likely To Prevail On Appeal

The first of the traditional stay factors is likelihood of success on the merits. Where, as here, the balance of equities favors the movant, the first factor requires only that the appeal presents a “serious legal question.” *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011); *Population Institute v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986).

This case presents several serious legal questions, and defendants have a strong chance of success on the merits. Defendants have a right to appeal the remand order because they removed this case under the federal-officer removal statute, 28 U.S.C. § 1442. *See* 28 U.S.C. § 1447(d); *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021). And defendants’

grounds for removal raise several serious jurisdictional questions as recognized by the numerous courts—including the Second and Ninth Circuits—that have granted stays pending appeal in similar climate-change cases. *See, e.g., County of San Mateo v. Chevron Corp.*, No. 18-15499, Dkt. 329, at 2 (9th Cir. June 30, 2022); *Connecticut v. Exxon Mobil Corp.*, No. 21-1446, Dkt. 80 (2d Cir. Oct. 5, 2021); *Delaware v. BP America Inc.*, Civ. No. 20-1429, 2022 WL 605822, at \*2 (D. Del. Feb. 8, 2022); *City of Hoboken v. Exxon Mobil Corp.*, Civ. No. 20-14243, Dkt. 133, at 5 (D.N.J. Dec. 15, 2021); *Minnesota v. American Petroleum Institute*, Civ. No. 20-1636, 2021 WL 3711072, at \*2 (D. Minn. Aug. 20, 2021).

1. Among other substantial questions, this appeal raises the questions whether claims seeking redress for global climate change are governed by federal common law and, if so, whether they are removable to federal court. Those questions are sufficiently serious to warrant a stay pending appeal.

a. As a preliminary matter, there is a substantial likelihood that the Supreme Court will grant certiorari in *Suncor* to address those questions. On October 3, 2022, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States on those issues. That development alone demonstrates that the Court is likely to grant review: once the Supreme Court has invited the Solicitor General to express the United States' views, a petition for a writ of certiorari “is over 46 times more likely to be granted.”

David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 274 (2009).

There is also a substantial likelihood that the government will support the petition in *Suncor*. The government has already taken the position that climate-change claims like those alleged here “must be governed by federal common law” and thus “are properly removable to federal court.” U.S. Reh’g Br. at 5, 11, *City of Oakland v. BP p.l.c.*, 960 F.3d 570 (9th Cir. 2020) (No. 18-16663, Dkt. 198); *see id.* at 6-12; Tr. of Oral Arg. at 31, *BP v. Baltimore, supra* (stating that the application of “potentially conflicting” state law to climate-change claims is inappropriate because such claims “depend[] on alleged injuries . . . caused by emissions from all over the world”); U.S. Br. at 26-28, *BP v. Baltimore, supra* (No. 19-1189).

The Supreme Court’s interest in these questions makes sense. The petition presents two important questions that have divided the courts of appeals. The first is whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by global climate change. *See* Pet. at I, *Suncor, supra*. The Second Circuit has held that claims seeking redress for injuries allegedly caused by global climate change “must be . . . federal claims” “brought under federal common law.” *City of New*

*York v. Chevron Corp.*, 993 F.3d 81, 95 (2021). The First, Fourth, and Tenth Circuits have reached the opposite conclusion. See *Rhode Island v. Shell Oil Products Co.*, 35 F.4th 44, 54-55 (1st Cir. 2022); *Mayor & City Council of Baltimore v. BP p.l.c.*, 31 F.4th 178, 200-204 (4th Cir. 2022); *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1260-1261 (10th Cir. 2022). The second question is whether a district court has federal-question jurisdiction over claims necessarily and exclusively governed by federal common law but labeled as arising under state law. Two courts of appeals have held that the answer is yes; four have reached the opposite conclusion. Compare *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924 (5th Cir. 1997), and *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213-1214 (8th Cir. 1997), with *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 707-708 (3d Cir. 2022); *Baltimore v. BP*, 35 F.4th at 200; *City of Oakland v. BP p.l.c.*, 969 F.3d 895, 903-907 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021); and *Suncor*, 25 F.4th at 1261-1262.

b. Defendants are likely to prevail on the merits of the question of removal on the basis of federal common law, both before this Court and the Supreme Court. Federal common law necessarily supplies the rule of decision for certain narrow categories of claims that implicate “uniquely federal interests,” including where “the interstate or international nature of the controversy makes it inappropriate for state law to control.” *Texas Industries, Inc.*

v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 (1981) (citation omitted). And “[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution.” *City of New York*, 993 F.3d at 91 (collecting cases). For example, in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), the Supreme Court reasoned that “[f]ederal common law,” and not the “varying common law of the individual States,” is “necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain.” *Id.* at 107 n.9 (citation omitted). In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Court unambiguously reaffirmed that “the regulation of interstate water pollution is a matter of federal, not state, law.” *Id.* at 488 (citation omitted). And in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011)—a case involving similar claims alleging injury from the contribution of greenhouse-gas emissions to global climate change—the Court reiterated that federal common law “undoubtedly” governs claims involving “air and water in their ambient or interstate aspects.” *Id.* at 421 (citation omitted).

As the Supreme Court has explained, the Constitution dictates that federal law must govern controversies over interstate pollution, because those controversies “touch[] basic interests of federalism” and implicate the “overriding federal interest in the need for a uniform rule of decision.” *City of Mil-*



*waukeee*, 406 U.S. at 105 n.6. The Constitution prohibits States from “regulat[ing] the conduct of out-of-state sources” of pollution. *Ouellette*, 479 U.S. at 495. Yet when the States “by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done.” *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Because “borrowing the law of a particular State would be inappropriate” to resolve such interstate disputes, the “basic scheme of the Constitution” requires the application of a federal rule of decision. *American Electric Power*, 564 U.S. at 421, 422.<sup>1</sup>

Applying the Supreme Court’s precedents in this area, the Second Circuit held in *City of New York* that claims seeking redress for injuries allegedly caused by the contribution of global greenhouse-gas emissions to global climate change present “the quintessential example of when federal common law is most needed.” 993 F.3d at 92. In the Second Circuit’s view, claims seeking to hold defendants liable for injuries arising from “the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet” are far too “sprawling” for state law to govern. *Id.* The court first

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<sup>1</sup> Federal common law also applies here because the District alleges injury through “environmental and economic destruction” in federal “navigable waters” in the District of Columbia, see *Milwaukee I*, 406 U.S. at 102; *Michigan v. Army Corps of Engineers*, 667 F.3d 765, 771 (7th Cir. 2011), and because the District’s case is intended to—and would—have significant impacts on United States foreign policy. See D. Ct. Dkt. 1, at 26-27.

reasoned that “a substantial damages award like the one requested by the City would effectively regulate the [energy companies’] behavior far beyond New York’s borders.” *Id.* The court further explained that application of state law to the City’s claims would “risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other.” *Id.* at 93.

The Second Circuit further rejected the argument that statutory displacement of any remedy under federal common law could “give birth to new state-law claims.” 993 F.3d at 98. That argument is “difficult to square with the fact that federal common law governed this issue in the first place,” the court reasoned, because “where ‘federal common law exists, it is because state law cannot be used.’” *Id.* (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981)). “[S]tate law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one” through enactment of the Clean Air Act. *Id.* “Such an outcome,” the Second Circuit concluded, is “too strange to seriously contemplate.” *Id.* at 98-99.

Like the plaintiffs in *City of New York*, the District of Columbia here requests relief for injuries allegedly caused by global climate change: for example, rising sea levels, extreme weather, damage to infrastructure, and personal injuries. *See* D. Ct. Dkt. 1-14, at 42-44. Indeed, the District alleges that, because of defendants' actions, consumers purchased gasoline when they may have "purchase[d] less fossil fuel products, or decide[d] to buy none at all." *Id.* at 67. In so doing, the District essentially alleges that defendants' lawful production, sale, and promotion of fossil fuels caused consumers to purchase *too much* gasoline, which, it is alleged, directly increased greenhouse-gas emissions and caused the District harm. At the same time, the District attempts to avoid federal jurisdiction by artfully pleading its claims as based on consumer deception. As the Second Circuit put it, however, a plaintiff "cannot have it both ways." *City of New York*, 993 F.3d at 91. The Second Circuit's reasoning is compelling and correct, and defendants submit that this Court is likely to agree with the Second Circuit and apply federal common law to the District's artfully pleaded claims. *See Milwaukee I*, 406 U.S. at 105 n.6.<sup>2</sup>

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<sup>2</sup> The Second Circuit acknowledged decisions holding that federal common law does not support removal but did not opine on whether those decisions were correctly decided, because the City of New York had "filed suit in federal court" on diversity grounds. *See* 993 F.3d at 94. Those decisions misunderstood defendants' federal-common-law argument as a preemption defense. Defendants' argument that federal common law necessarily governs the District's claims is not merely a defense—federal law provides the substantive law governing the elements of claims seeking redress for injuries allegedly caused by global climate change. And the Second Circuit's rationale in disposing of

2. Defendants' other grounds for removal also raise serious legal questions that justify a stay pending appeal.

a. For starters, federal common law also provides a basis for removal under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Even if this Court were to hold that the District's claims are properly brought under state law, aspects of the claims would be governed by federal common law. That, in and of itself, justifies removal under *Grable* as a claim that "raise[s] substantial questions of federal law by implicating the federal common law." *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 542-543 (5th Cir. 1997).

Further, this action raises substantial federal issues that are actually disputed, warranting the exercise of federal-question jurisdiction. *Grable* permits federal courts to exercise jurisdiction over claims that, like the District's, "directly implicate[] actions taken by [federal agencies] in approving the creation of [federal programs] and the rules governing [them]." *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009). "[G]reenhouse gas emissions are the subject of numerous federal statutory regimes and international treaties," and the District's efforts to "sidestep[]" such

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New York City's claims—that they "must be . . . federal claims" "brought under federal common law"—means federal jurisdiction exists, including upon removal. *Id.* at 95.

“carefully crafted frameworks” through this lawsuit are improper. *City of New York*, 993 F.3d at 86.

b. Federal-officer removal jurisdiction also exists and, at a minimum, raises serious legal questions. *See* 28 U.S.C. § 1442(a). The District’s claims relate to many actions defendants took under federal direction. For example, federal officials extensively supervised and controlled defendants’ production of fossil fuels and development of specialized military products in support of multiple war efforts. *See* D. Ct. Dkt. 51, at 34-40. Defendants have also worked to extract and produce critical energy resources for the nation under federal direction. *See id.* at 40-43. In addition, defendants (or their predecessors, subsidiaries, or affiliates) have acted under federal direction as operators and lessees of the Strategic Petroleum Reserve infrastructure; the relevant leases obligated defendants to pay royalties in kind to the federal government and support the government during drawdowns. *See id.* at 45-46.

The district court did not challenge defendants’ assertions that they “acted under the federal government’s direction,” and it even acknowledged that “the injuries the District[] alleges—in short, climate change—eventually trace back to fossil fuel usage.” App., *infra*, 17a-18a. That alone is a sufficient basis to grant federal-officer removal. As the Fifth Circuit explained, recent amendments to the statute “plainly express[] that a civil action *relating to* an act under color of federal office may be removed.” *Latiolais v. Huntington*

*Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020). Although this Court has not decided the question, it recognized that its “sister circuits [have] read [the new statutory] language as relaxing the nexus requirement.” *K&D LLC v. Trump Old Post Office, LLC*, 951 F.3d 503, 507 n.1 (2020). The district court erred by holding that defendants did not establish a sufficient connection “between ‘the charged conduct and the asserted official authority.’” App, *infra*, 17a. The correct standard (which does not require a causal connection) at least presents a substantial legal question warranting a stay pending appeal.

c. Defendants also have substantial arguments that removal was proper under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(1), because defendants have engaged in substantial operations on the Outer Continental Shelf. See D. Ct. Dkt. 1, at 50. The District’s claims “arise out of or in connection with” those operations, because fossil-fuel production on the Outer Continental Shelf is part of the production about which defendants allegedly misled District of Columbia consumers.

In sum, when this Court reviews defendants’ asserted bases for removal, it will likely hold that one or more of them were valid. Defendants have made a strong showing of a likelihood of success on the merits. At a minimum, defendants have presented “serious legal question[s]” on appeal, which suffices to warrant a stay where, as here, the balance of harms tilts decidedly in defendants’ favor. *Sherley*, 644 F.3d at 398 (citation omitted).

## **B. Defendants Will Suffer Irreparable Harm Absent A Stay**

Once the D.C. Superior Court receives the remand order, this case could proceed there while defendants' appeal is pending. Such a result necessarily deprives defendants of their right to proceed in a federal forum for a period of time. And if, in the absence of a stay, the Superior Court were to proceed to final judgment before resolution of this and any subsequent appeal, defendants could be deprived of that right permanently.

That constitutes irreparable harm, as multiple courts in similar climate-change-related cases have concluded. *See, e.g., Connecticut, supra*, at 1; *Delaware*, 2022 WL 605822, at \*2-\*3; *Hoboken, supra*, at 5-6; *Minnesota*, 2021 WL 3711072, at \*2-\*4. As one court explained, "concrete and irreparable injury" exists where the "failure to enter a stay will result in a meaningless victory in the event of appellate success." *Minnesota*, 2021 WL 3711072, at \*3 (internal quotation marks omitted). For that reason, "returning the case now could defeat the very purpose of appellate review." *Hoboken, supra*, at 5; *see Delaware*, 2022 WL 605822, at \*2. Recently, moreover, another court stayed execution of its remand order in a similar climate-change case because of the Supreme Court's call for the views of the Solicitor General in *Suncor*, explaining that "litigation in the state court now has potential to do more harm than good." *City of Annapolis v. BP p.l.c.*, Civ. No. 21-772, 2022 WL 15523629, at \*5 (D. Md. Oct. 27, 2022).

In addition, while defendants' appeal is pending, the D.C. Superior Court could rule on various substantive and procedural motions, including dispositive motions adjudicating the parties' claims and defenses. The Superior Court may also decide discovery motions. There is serious risk that such motions would be decided differently than they would be in federal court. For example, the District may argue that District of Columbia courts have different pleading standards or discovery rules than federal courts, raising the possibility that the outcome of these motions in D.C. Superior Court would be different than in federal court. Should defendants be directed to submit to discovery greater than would be required by a federal forum due to differences in procedural rules, there will be no way to undo the cost and burden of that discovery; defendants' ability to take advantage of the federal forum would be "effectively mooted," and they would suffer irreparable harm as a result. *See Suarez v. Saul*, Civ. No. 19-173, 2020 WL 5535625, at \*1 (D. Conn. Sept. 15, 2020); *Citibank, N.A. v. Jackson*, Civ. No. 16-712, 2017 WL 4511348, at \*2 (W.D.N.C. Oct. 10, 2017).

Simultaneous litigation in local and federal forums would also be unnecessarily burdensome for defendants and the relevant courts alike. Without a stay, defendants would be forced to devote substantial resources to litigating in D.C. Superior Court, including by preparing dispositive motions and potentially engaging in discovery. *See Lafalier v. Cinnabar Service Co.*, Civ. No.



10-5, 2010 WL 1816377, at \*2 (N.D. Okla. Apr. 30, 2010); *Citibank*, 2017 WL 4511348, at \*2-\*3. If the Court or the Supreme Court holds that this case is properly removable, any resources devoted to preparing those motions and conducting discovery would be wasted. Because defendants are unlikely to recover any of those sunk costs from the state, such harm is irreparable. *See Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304-1305 (2010) (Scalia, J., in chambers); *Citibank*, 2017 WL 4511348, at \*2-\*3; *Ewing Industries Co. v. Bob Wines Nursery, Inc.*, Civ. No. 13-931, 2015 WL 12979096, at \*3 (M.D. Fla. Feb. 5, 2015); *Wilcox v. Lloyds TSB Bank, PLC*, Civ. No. 13-508, 2016 WL 917893, at \*6 (D. Haw. Mar. 7, 2016). The failure to stay issuance of the district court's remand order would thus irreparably harm defendants in numerous ways.

### **C. The Balance Of Harms Tilts Sharply In Defendants' Favor**

Although “[t]he first two factors of the traditional standard are the most critical,” *Nken*, 556 U.S. at 434, the remaining factors further support a stay of the remand order pending appeal. Where, as here, the government is the opposing party, the third and fourth factors—harm to the opposing party and the public interest—“merge” and should be considered together. *See id.* at 435.

The District will not be “substantially injured” if this Court enters a stay. As one court recently noted in granting a stay of proceedings in a similar climate-change case, “the outcome of this lawsuit cannot turn back the clock

on the atmospheric and ecological processes that defendants' activities have allegedly helped set in motion," and "[t]he urgency of the threat of climate change writ large is distinct from plaintiff's interest in a speedy determination of federal jurisdiction in this suit." *City of Annapolis*, 2021 WL 2000469, at \*4. As another noted, "a relatively short pause of this likely lengthy litigation will not substantially harm [p]laintiff's ability to prosecute its case." *Delaware*, 2022 WL 605822, at \*3. "The public interest would be best served by avoiding the possibility of unnecessary or duplicative litigation and concentrating resources on litigating [p]laintiff's claims in the proper forum." *Id.*

So too here. A stay pending appeal would conserve the parties' resources by allowing them to litigate this appeal without being saddled with simultaneous and potentially unnecessary litigation in D.C. Superior Court. *See Dalton v. Walgreen Co.*, Civ. No. 13-603, 2013 WL 2367837, at \*2 (E.D. Mo. May 29, 2013). Similarly, a stay will avoid the same risk of harm to the District from potentially inconsistent outcomes if the remand order is reversed on appeal. *See Raskas v. Johnson & Johnson*, Civ. No. 12-2174, 2013 WL 1818133, \*2 (E.D. Mo. Apr. 29, 2013).

The "public interest" would also be served by a stay. The D.C. Superior Court would be spared from wasting scarce judicial resources adjudicating an action that may later be returned to federal court. *See Delaware*, 2022 WL 605822, at \*3. And the district court would be spared from confronting the

“rat’s nest of comity and federalism issues” that would inevitably arise if the court had to evaluate the precedential or persuasive force of any intervening merits or discovery orders issued by the D.C. Superior Court. *Northrop Grumman Technical Services, Inc. v. DynCorp International LLC*, Civ. No. 16-534, 2016 WL 3346349, \*4 (E.D. Va. June 16, 2016). Accordingly, all of the relevant factors support the issuance of a stay here.

## CONCLUSION

The motion for a stay of the remand order pending appeal should be granted.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE  
WITH TYPEFACE AND WORD-COUNT LIMITATIONS**

I, Kannon K. Shanmugam, counsel for appellants Exxon Mobil Corporation and ExxonMobil Oil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), that the foregoing Motion of Appellants for an Emergency Stay of the Remand Order Pending Appeal is proportionately spaced, has a typeface of 14 points or more, and contains 5,198 words. I further certify that the other signatories to this brief consented to my use of their electronic signature.

DECEMBER 23, 2022

/s/ Kannon K. Shanmugam

KANNON K. SHANMUGAM

## ADDENDUM A

### CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I, Kannon K. Shanmugam, counsel for appellants Exxon Mobil Corporation and ExxonMobil Oil Corporation and a member of the Bar of this Court, certify as follows:

**(A) Parties and amici.** The parties, intervenors, and amici that appeared before the district court and are participating in this appeal are the District of Columbia; BP p.l.c.; BP America Inc.; Chevron Corporation; Chevron U.S.A. Inc.; Exxon Mobil Corporation; ExxonMobil Oil Corporation; Shell plc (formerly known as Royal Dutch Shell plc); and Shell USA, Inc. (formerly known as Shell Oil Company).

**(B) Rulings under review.** The ruling under review is the district court's order and memorandum opinion of November 12, 2022, remanding the case to the Superior Court of the District of Columbia.

**(C) Related cases.** The following cases are related to this appeal within the meaning of Circuit Rule 28(a)(1)(C):

*Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir.)

*Anne Arundel County v. BP p.l.c., et al.*, No. 22-2082 (4th Cir.)

*City of Annapolis v. BP p.l.c., et al.*, No. 22-2101 (4th Cir.)

*Minnesota v. American Petroleum Institute, et al.*,  
No. 21-1752 (8th Cir.)

*City of Oakland, et al. v. BP p.l.c., et al.*, No. 22-16810 (9th Cir.)

*City & County of San Francisco, et al. v. BP p.l.c., et al.*,  
No. 22-16812 (9th Cir.)

The following related cases are pending at the United States Supreme Court:

*Suncor Energy (U.S.A.) Inc., et al. v. Board of County Commissioners  
of Boulder County, et al.*, No. 21-1550

*B.P. p.l.c., et al. v. Mayor & City Council of Baltimore*, No. 22-361

*Chevron Corp., et al. v. San Mateo County, et al.*, No. 22-495

*Sunoco, LP, et al. v. City & County of Honolulu*, No. 22-523

*Shell Oil Products Co., L.L.C., et al. v. Rhode Island*, No. 22-524

*City of Hoboken v. Exxon Mobil Corp., et al.*, No. 22A528

/s/ Kannon K. Shanmugam

KANNON K. SHANMUGAM

DECEMBER 23, 2023



## **ADDENDUM B**

### **CORPORATE DISCLOSURE STATEMENT**

Appellant BP p.l.c. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellant BP America Inc. is a wholly owned indirect subsidiary of appellant BP p.l.c.

Appellant Chevron Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellant Chevron U.S.A. Inc. is a wholly owned subsidiary of appellant Chevron Corporation.

Appellant Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellant ExxonMobil Oil Corporation is a wholly owned indirect subsidiary of appellant Exxon Mobil Corporation.

Appellant Shell plc has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellant Shell USA, Inc., is a wholly owned indirect subsidiary of appellant Shell plc.

## **APPENDIX**

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

DISTRICT OF COLUMBIA,

*Plaintiff,*

v.

EXXON MOBIL CORPORATION *et al.*,

*Defendants.*

Civil Action No. 20-1932 (TJK)

**ORDER**

For the reasons set forth in the Court's accompanying Memorandum Opinion, it is hereby **ORDERED** that Plaintiff's Motion to Remand to State Court, ECF No. 45, is **GRANTED**. It is further **ORDERED** that this case shall be remanded to the Superior Court of the District of Columbia. The Clerk of Court is directed to close the case.

**SO ORDERED.**

/s/ Timothy J. Kelly

TIMOTHY J. KELLY

United States District Judge

Date: November 12, 2022

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA,

*Plaintiff,*

v.

EXXON MOBIL CORPORATION *et al.*,

*Defendants.*

Civil Action No. 20-1932 (TJK)

**MEMORANDUM OPINION**

The District of Columbia sued Defendants, a group of energy companies, for violating a District of Columbia consumer protection law. The District alleges, among other things, that Defendants knowingly misrepresented the effects of fossil fuel products to consumers within the District through misleading advertisements and biased scientific studies. Defendants removed the case to federal court, invoking seven bases for the Court’s subject-matter jurisdiction. The District of Columbia moved to remand to Superior Court, and Defendants opposed. For the following reasons, the Court will grant the District’s motion to remand.

**I. Background**

The District of Columbia (“the District”) sued Exxon Mobil, BP, Chevron, Shell Oil, and relevant subsidiaries (“Defendants”) in District of Columbia Superior Court for alleged violations of the D.C. Consumer Protection Procedures Act (“the Act”). ECF No. 1-14 at 6. According to the District, Defendants have known about the harmful effects of fossil fuels for decades yet have misrepresented those effects and “promoted disinformation” to District of Columbia consumers. *Id.* at 36. The complaint alleges, for example, that Defendants “funded and controlled” scientists to manipulate public perception on fossil fuels and embarked on “misleading” advertising campaigns in the *Washington Post* and elsewhere to deceive the public about the effects of fossil fuels

on the environment. *See, e.g., id.* at 41–42. The District also alleges that Defendants’ violations of the Act are ongoing, and that Defendants have now “turned their attention to misleading consumers about their level of investment in cleaner energy sources.” *Id.* at 53. According to the complaint, Defendants have undertaken “greenwashing campaigns,” in which they promote their investment in “alternative energy sources” but intentionally overstate their commitment to non-fossil fuels. *See, e.g., id.* at 58. According to the District, Defendants’ actions have caused “existential” environmental injuries—such as rising temperatures and sea levels—which cause “damage [to] critical infrastructure and property,” “heat waves,” “flooding,” and other “extreme weather.” ECF No. 1-14 at 52–53.

The District claims that each Defendant and its subsidiary violated the Act by “engaging in a number of deceptive acts and practices in its marketing, promotion, and sale of fossil fuel products.” ECF No. 1-14 at 77, 80, 82, 84–86. For relief, the District seeks an order enjoining Defendants from violating the Act. It also seeks civil penalties, restitution, and damages as provided by the Act. *Id.* at 86–87; *see* D.C. Code § 28-3909.

Exxon removed the case to this Court, ECF No. 1, and the other defendants consented, ECF No. 8, 12, 16. In the notice of removal, Defendants claimed that removal is proper because (1) the claims arise under federal common law; (2) the lawsuit raises disputed and substantial federal issues under *Grable*; (3) the action arises out of federal enclaves; (4) the Federal Officer Removal statute applies; (5) the Outer Continental Shelf Lands Act applies; (6) diversity jurisdiction exists; and (7) the Class Action Fairness Act applies. ECF No. 1 at 11–12. The District moved to remand, ECF No. 45, and Defendants opposed, ECF No. 51. Since then, the parties have peppered the docket with notices of supplemental authority. *See, e.g.,* ECF Nos. 66, 68, 71, 74, 77, 78, 82, 84, 87, 89, 91, 93, 97, 103, 107, 108, 112, 114.

## II. Legal Standard

Federal courts are courts of limited jurisdiction and “possess only that power authorized by Constitution and statute.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). Thus, “[a] civil action filed in state court may only be removed to a United States district court if the case could originally have been brought in federal court.” *Nat’l Consumers League v. Flowers Bakeries, LLC*, 36 F. Supp. 3d 26, 30 (D.D.C. 2014) (citing 28 U.S.C. § 1441(a)). “When a plaintiff files a motion to remand, the removing defendant bears the burden of proving that removal was proper.” *Arenivar v. Manganaro Midatlantic, LLC*, 317 F. Supp. 3d 362, 367 (D.D.C. 2018) (internal quotation marks omitted). “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447. “Any doubts about the existence of subject matter jurisdiction are to be resolved in favor of remand.” *Witte v. Gen. Nutrition Corp.*, 104 F. Supp. 3d 1, 3 (D.D.C. 2015) (cleaned up).

## III. Analysis

Defendants raise seven theories for the Court’s subject-matter jurisdiction. Each, they say, is an independent ground for removal. None is.

### A. Federal Common Law Does Not Confer Jurisdiction Over the District’s Claims

Defendants argue that the suit must be heard in federal court because the District’s claims implicate interstate pollution, the navigable waters of the United States, and foreign affairs, and therefore its consumer protection claims “necessarily” arise under federal common law. In other words, even though the District did not plead a federal claim, Defendants say that the Court has jurisdiction because claims “may arise under federal common law regardless of whether a plaintiff affixes a federal law label.” ECF No. 51 at 29. In response, the District argues that federal common law does not apply to its state consumer protection claims, but even if it did, it cannot support

removal because the federal question must appear on the face of their well-pleaded complaint, and complete preemption does not apply. ECF No. 63 at 18–19.

For Defendants to demonstrate federal-question jurisdiction on federal common law grounds, they must first show that federal common law applies to the District’s false-advertising claims or that the Court should fashion a new federal common law rule. Defendants come up well short on this first step.

The Court has original jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. “There is, of course, ‘no federal general common law.’” *Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 640 (1981) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). But the Supreme Court has recognized “few and restricted” areas of federal common law to protect “uniquely federal interests.” *Id.* Federal courts should tread lightly in this area, however, because “whether latent federal power should be exercised to displace state law is primarily a decision for Congress.” *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (cleaned up). In the rare instance when a federal court creates such a rule, it must ensure two things. First, the state law or claim must affect “uniquely federal interests.” *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988). Second, there must be “significant conflict” between the federal interests and state law.<sup>1</sup> *Id.* at 507.

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<sup>1</sup> Defendants argue that this test for creating federal common law does not apply and that the Court has jurisdiction if “plaintiff has stated a viable federal claim.” ECF No. 51 at 29. In support, they cite only a case from the First Circuit, *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 42–45 (1st Cir. 1999), but that case is inapt. There, the plaintiff brought asset forfeiture claims in federal court based on federal common law theories. *Id.* at 42. Thus, state law was not in the picture, and the court only had to address whether the plaintiff had a cognizable claim under federal common law. The court did not address the dispositive question here: whether there is “significant conflict” between a state law claim and federal interests such that the state law claim cannot exist.



Defendants use almost all their opposition to argue that the District’s claims “implicate” three uniquely federal interests: interstate pollution, the navigable waters of the United States, and foreign affairs. Fair enough.<sup>2</sup> But even so, their argument fails because they have not shown a “significant conflict” between the District’s claims under the Act and a federal interest they identify. *See O’Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994) (failing to show “significant conflict” is “fatal” to federal common law argument). Simply put, they do not engage with this prong of the federal common law test. *See, e.g.*, ECF No. 51 at 29 (arguing only that the District’s claims “implicate” federal interests). They do not, for example, sufficiently describe actual conflict between the Act’s protections against misleading advertising and federal interests in regulating “transboundary pollution.” Nor do they explain how the District’s false-advertising claims conflict with federal interests in regulating the navigable waters or in foreign affairs. Defendants do not even use the phrase “significant conflict” in their opposition. Several courts have found this shortcoming dispositive, and the Court agrees with their reasoning. *See, e.g., Mayor and City Council v. BP P.L.C.*, 31 F.4th 178, 202 (4th Cir. 2022) (defendants’ failure to establish significant conflict “substantively precludes the creation of federal common law”); *Rhode Island v. Shell Oil Prods. Co., LLC*, 35 F.4th 44, 54–56 (1st Cir. 2022) (explaining that defendants do not “adequately describe” the significant conflict between federal interests and the state law claims).

The closest Defendants come to identifying any such conflict is by reference to a case in the Southern District of New York. There, the court granted the defendants’ motion to dismiss under Rule 12(b)(6) and held that New York City’s nuisance claims could not proceed under state

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<sup>2</sup> The Court assumes, without deciding, that Defendants have identified “uniquely federal interests” to satisfy the first part of the federal common law test. *See Mayor and City Council v. BP P.L.C.*, 31 F.4th 178, 202 (4th Cir. 2022); *Rhode Island v. Shell Oil Prods. Co., LLC*, 35 F.4th 44, 54 (1st Cir. 2022).

law because federal common law preempted them. *See City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018), *aff'd sub nom. City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). But that case has limited relevance here; it involved an ordinary preemption defense at the motion-to-dismiss stage. The case was also brought in federal court, so removal was not at issue. Thus, the trial court never considered whether federal common law completely preempted any state law pollution claims and justified removal of a state-law claim. The Second Circuit recognized the importance of this procedural posture in its affirmance, explaining that it was considering the “preemption *defense* on its own terms, not under the heightened standard unique to the removability inquiry.” *City of New York v. Chevron Corp.*, 993 F.3d at 94 (emphasis added). In any event, Defendants do not explain how that case shows “significant conflict” between the District’s false advertising claims and the federal interests they identify, nor do they engage in the extensive analysis the Supreme Court has undertaken in its past cases to determine whether significant conflict exists. *See, e.g., Atherton*, 519 U.S. at 216–19; *Boyle*, 487 U.S. at 511–12. On this score, the Court is aligned with at least three courts of appeals.<sup>3</sup> *See BP P.L.C.*, 31 F.4th at 202–03; *Shell Oil*, 35 F.4th at 55; *Bd. of Cnty. Comm’rs. v. Suncor Energy (U.S.A.)*

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<sup>3</sup> Defendants also seek to rely on *American Electric Power Co. v. Connecticut* (“*AEP*”), 564 U.S. 410 (2011), to support their argument that federal common law governing “transboundary pollution” claims governs the District’s claims, *see* ECF No. 51 at 31–32. That case does not help them. In *AEP*, the plaintiffs asserted nuisance claims under federal common law in federal court, and the Supreme Court held that Congress had displaced the federal common law in this area with the Clean Air Act. *See AEP*, 564 U.S. at 424. Under *AEP*, it is unclear how the District’s claims could arise under federal common law in this area if those “federal law claim[s] [have] been deemed displaced, extinguished, and rendered null by the Supreme Court.” *BP P.L.C.*, 31 F.4th at 206. The Court cannot find that the District’s claims arise under federal common law “based on a non-existent theory of federal common law when its viability is ‘no longer open to discussion.’” *BP P.L.C.*, 31 F.4th at 207 (quoting *Hagans v. Levine*, 415 U.S. 528, 537 (1974)).

*Inc.*, 25 F.4th 1238, 1262 (10th Cir. 2022). Federal common law does not apply to the District's claims.

Even if federal common law applied here, though, Defendants hit another roadblock: the well-pleaded complaint rule, which limits federal-question jurisdiction. The rule mandates that “the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense.” *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494 (1983). The rule applies both to the Court's original jurisdiction and a defendant's ability to remove a case on federal-question grounds under 28 U.S.C. § 1441. *See Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 10 n.9 (1983). The plaintiff is therefore the “master of the claim” and may “avoid federal jurisdiction by exclusive reliance on state law” when drafting its complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Federal-question jurisdiction does not exist if defendants raise a *defense* rooted in federal law. *See, e.g., Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004).

Defendants argue that the well-pleaded complaint rule does not apply here. And indeed, there are exceptions to this general rule. One is the doctrine of complete preemption. Sometimes, a “federal statute completely preempts the state law cause of action,” and the claim, “even if pleaded in terms of state law, is in reality based on federal law.” *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003). Federal courts therefore have jurisdiction over that claim because “the preemptive force of [the] statute is so extraordinary that it converts an ordinary state-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.” *Caterpillar*, 482 U.S. at 493. This scenario is rare; the Supreme Court has recognized complete preemption in the cases of only three federal statutes. *See Beneficial*, 539 U.S. at 6–11. Complete preemption differs from ordinary preemption, which is a defense that “forecloses a plaintiff from stating a legally

cognizable claim for recovery” based on state law. *Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 345 (D.C. Cir. 2018). An ordinary preemption defense does not create federal-question jurisdiction. *See Caterpillar*, 482 U.S. at 398–99.

Defendants say that “federal common law exclusively governs claims for interstate and international pollution because the Constitution dictates that ‘state law cannot be used.’” ECF No. 51 at 38 (quoting *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 314 n.7 (1981)). Although Defendants skillfully avoid using the term “complete preemption,” they effectively argue for a “new form of complete preemption”—mandated by the Constitution, they say—rooted in federal common law. *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 707 (3d Cir. 2022). True, as described above, complete preemption is an exception to the well-pleaded complaint rule. But the Supreme Court has only recognized complete preemption in the context of federal *statutes*. *See City of Hoboken*, 45 F.4th at 707. And even then, the Supreme Court has recognized it only three times. *See id.* Defendants furnish no authority suggesting that the federal common law can “transform” a state law claim into a federal one. *Caterpillar*, 482 U.S. at 399. This is unsurprising, given that complete preemption requires a “clear and manifest purpose” from Congress—something unavailable from a judge-made federal common law rule. *City of Milwaukee*, 451 U.S. at 316. Two courts of appeals have ended similar removal inquiries there, and the Court finds that reasoning persuasive as well. *See City of Hoboken*, 45 F.4th at 708 (“So because [the defendants] have no statute, they have no removal jurisdiction either.”); *Suncor*, 25 F.4th at 1262 (“[B]ecause the federal common law does not *completely* preempt state law, removal is not warranted . . .”). Of course, Defendants may eventually invoke a preemption defense when challenging the merits of the District’s claim. But the Court is aware of no authority holding that the existence of a federal common law claim completely preempts any state law claim on that topic and “transform[s]” any

state claim into a federal one, “thereby selecting the forum in which the claim shall be litigated.” *Caterpillar*, 482 U.S. at 399.

### **B. Removal is Improper Under *Grable***

Defendants contend that removal is proper because the District’s claims necessarily raise a disputed and substantial federal question under *Grable*. ECF No. 51 at 39. *Grable* says that in rare circumstances, federal-question jurisdiction exists even if a complaint fails the well-pleaded complaint rule. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 313–14 (2005)). Under this doctrine, “federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Because exercising this jurisdiction approaches “the outer reaches of § 1331,” *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804, 810 (1986), the Supreme Court has repeatedly characterized the cases satisfying this test as a “slim category,” *Gunn*, 568 U.S. at 258; *Empire Healthchoice Assurance., Inc. v. McVeigh*, 547 U.S. 677, 701 (2006).

For a federal issue to be “necessarily raised,” it must be an “essential element” of the state-law claim. *D.C. Ass’n of Chartered Pub. Schools v. District of Columbia*, 930 F.3d 487, 491 (D.C. Cir. 2019) (quoting *Grable*, 545 U.S. at 315). Courts exercising *Grable* jurisdiction identify a precise federal issue and explain why that issue is necessary to resolve the state law claim. *See, e.g., Grable*, 545 U.S. at 310 (state law quiet-title suit requiring interpretation of Internal Revenue Code’s notice requirement); *Gunn*, 568 U.S. at 259 (state legal-malpractice claim required application of federal patent law); *Bender v. Jordan*, 623 F.3d 1128, 1130–31 (D.C. Cir. 2010) (state breach-of-contract claim required interpretation of federal regulation); *District of Columbia v. Grp. Hosp. and Med. Servs.*, 576 F. Supp. 2d 51, 54–55 (D.D.C. 2008) (state-law claims required determination whether defendants violated their congressional charter).

Nothing similar is present here. In sum, Defendants have identified no disputed federal issue necessary to resolve the District’s consumer protection claims.<sup>4</sup> They argue that the District’s “theory of deception” implicates a slew of federal interests, including the federal government’s regulatory framework on climate issues, national policies balancing energy production with environmental protection, and foreign affairs. ECF No. 51 at 40–43. Even so, Defendants merely explain purported benefits of federal jurisdiction; they do not point to any “nearly pure question of federal law” necessary to adjudicate the District’s claims. *Bender*, 623 F.3d at 145. For example, Defendants cite the Clean Air Act and other federal regulations to argue that “Congress has already weighed the costs and benefits of fossil fuels” and thus it is “essential” that the District’s claims are resolved in federal court. ECF No. 51 at 42. They similarly contend that allowing the District to proceed in state court would “disrupt the principles of federalism.” *Id.* at 47. But the District’s claims under the Act—that Defendants misled consumers about the effects of fossil fuels—can be adjudicated without a court resolving any questions of federal law. Defendants may raise these federalism concerns as a preemption defense later, but such a defense does not create federal-question jurisdiction. *See Suncor*, 25 F.4th at 1266.

Other courts have declined to exercise *Grable* jurisdiction in similar circumstances. *See Shell Oil*, 35 F.4th at 56–57; *BP P.L.C.*, 31 F.4th at 208–215; *Suncor*, 25 F.4th at 1267. Simply put, Defendants identify no question involving any federal statute, regulation, or other federal issue necessarily raised for the District to prevail under the Act, and “speaking about federal law or federal concerns in the most generalized way is not enough for *Grable* purposes.” *Shell Oil*, 35

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<sup>4</sup> The District’s claims under the Act require that Defendants misrepresent goods or services to consumers within the District; misrepresent a material fact that has a tendency to mislead; or fail to state a material fact if that failure tends to mislead. *See* D.C. Code § 28-3904(a), (e), (f).

F.4th at 57. The Court therefore finds that *Grable* jurisdiction does not lie, and removal is not proper on that ground.<sup>5</sup>

### C. The Court Does Not Have Federal Enclave Jurisdiction

Defendants argue that some of Defendants’ alleged unlawful conduct occurred within federal enclaves—including military installations such as Fort Lesley J. McNair, and monuments and parks controlled by the National Park Service—and therefore the Court has exclusive jurisdiction over the District’s claims under the Constitution. ECF No. 51 at 47. They also argue that by “targeting” Defendants’ oil and gas operations, the District’s claims “necessarily sweep[ ] in those operations that occur on military bases and other federal enclaves.” *Id.* at 48.

The Constitution authorizes Congress “[t]o exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings.” U.S. Const. art. I, § 8, cl. 17. Known as the “Enclave Clause,” courts have “generally read [the clause] to establish federal subject matter jurisdiction over tort claims occurring on federal enclaves . . . even when applying state law.” *Jograj v. Enter. Servs., LLC*, 270 F. Supp. 3d 10, 16 (D.D.C. 2017). In other words, “federal law applies to a legal controversy arising on federal enclaves” and “a court has jurisdiction over such a claim under § 1331.” *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 749 (9th Cir. 2022). Exclusive federal jurisdiction remains “unless reserved or authorized by Congress.” *Thomas v. Securiguard Inc.*, 412 F. Supp. 3d 62, 74 (D.D.C. 2019) (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 (1988)).

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<sup>5</sup> Defendants must satisfy “all four” requirements under *Grable* to establish federal-question jurisdiction on this theory. *Gunn*, 568 U.S. at 258. Because Defendants fail on prong one, the Court need not address the other three. *See, e.g., Shell Oil*, 35 F.4th at 56.

The question here is whether the Enclave Clause confers federal jurisdiction when some of the pertinent activity occurred on a federal enclave but some did not.<sup>6</sup> Neither party cites any binding authority on this question, and another court in this District has characterized the law in this area as “not entirely settled.” *Jograj*, 270 F. Supp. 3d at 16; *see City of Roseville v. Norton*, 219 F. Supp. 2d 130, 150 (D.D.C. 2002) (“There is scarce case law interpreting the enclaves clause.”). But several courts of appeals addressing the question in analogous litigation have held that federal enclave jurisdiction requires “that *all* pertinent events take place on a federal enclave.” *Suncor*, 25 F.4th at 1271 (cleaned up); *see BP P.L.C.*, 31 F.4th at 217–19; *Shell Oil*, 35 F.4th at 58; *see also Cnty. of San Mateo*, 32 F.4th at 750 (finding that connection between alleged conduct and federal enclaves “too attenuated and remote” to establish subject-matter jurisdiction). Consistent with this principle, the Supreme Court has held that Indian reservations are federal enclaves only with respect to conduct that happened wholly within the reservation. *See Nevada v. Hicks*, 533 U.S. 353, 361–62, 365 (1990) (holding that jurisdiction under Enclaves Clause only lies for “on-reservation conduct involving only Indians” and that “State sovereignty does not end at a reservation’s border”). Courts in this District have similarly considered the question of federal-enclave jurisdiction only when the relevant conduct or injury occurred entirely within a purported federal enclave. *See, e.g., Youssef*, 2021 WL 3722742, at \*11.

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<sup>6</sup> Defendants do not appear to argue that federal-enclave jurisdiction lies because the *entire* District of Columbia itself is a federal enclave. *See Youssef v. Embassy of the United Arab Emirates*, No. 17-cv-2638 (KBJ), 2021 WL 3722742, at \* 11 (D.D.C. Aug. 23, 2021) (The “District of Columbia is neither a state nor a territory, but a federal enclave itself.” (cleaned up)). And there does not appear to be any support for such a view. Although the District of Columbia is a federal creation, Congress effectively delegated governance to local authorities through the Home Rule Act of 1973. *See United States v. Simmons*, No. 18-cr-344 (EGS), 2022 WL 1302888, at \*2 (D.D.C. May 2, 2022). Thus, unlike in the case of a state and a federal enclave within its boundaries, in general, “the federal enclave doctrine does not apply to limit the applicability of D.C. laws with respect to entities located in the District.” *See Youssef*, 2021 WL 3722742, at \* 11.



That is not the case here. The District alleges that Defendants' false advertising affected consumers across the District of Columbia. *See, e.g.*, ECF No. 1-14 at 29. It also alleges that the resulting injures—a cascade of environmental harms—occurred throughout the District of Columbia. *See* ECF No. 1-14 at 11–12. Again, Defendants seem to concede that the District's allegations pertain to activity across the District of Columbia, even if some of that activity happened in a federal enclave. And Defendants do not argue that anything especially significant happened in a federal enclave that did not occur elsewhere. Thus, as several other courts have in similar circumstances, this Court declines to find that federal enclave jurisdiction is appropriate.

#### **D. Removal is Improper Under the Outer Continental Shelf Lands Act**

Defendants contend that the Court has jurisdiction over the District's claims under the Outer Continental Shelf Lands Act ("OCSLA"). OCSLA provides original jurisdiction for "cases and controversies arising out of, or in connection with . . . any operation conducted on the outer Continental shelf." 43 U.S.C. § 1349(b). They argue that the District's claims arise in connection with their offshore drilling operations, which are "operations" under OCSLA, and because the District's false advertising allegations "necessarily sweep[ ] in Defendants' activities on" the outer continental shelf. ECF No. 51 at 67. The District says that Defendants' interpretation of OCSLA is too broad. It contends that Defendants' false advertising, which caused the injury, is not an "operation" under OCSLA, and that any offshore drilling was not the "but for" cause of the District's injury. ECF No. 63 at 26. The District has the better argument.

The D.C. Circuit has not interpreted the limits of OCSLA's jurisdictional grant. Thus, the parties—and other courts addressing the question—have turned to the Fifth Circuit for guidance. To establish jurisdiction under OCSLA, a party must show that "(1) the activities that caused the injury constituted an 'operation' 'conducted on the outer Continental Shelf' that involved the exploration and production of minerals, and (2) the case 'arises out of, or in connection with' the

operation.” *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014). In defining the second requirement, the Fifth Circuit requires an operation on the outer Continental Shelf to be the “but-for” cause of the plaintiff’s injuries. *See In re Deepwater Horizon*, 745 F.3d at 163; *see also BP P.L.C.*, 31 F.4th at 220; *Suncor*, 25 F.4th at 1272–75; *but see Cnty. of San Mateo*, 32 F.4th at 754 (declining to require “but-for” causation). And although § 1349(b)(1) is a “broad” jurisdictional provision, *Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co.*, 448 F.3d 760, 768 (5th Cir. 2006), a “mere connection” between operations on the outer Continental Shelf and a plaintiff’s injury will not establish jurisdiction if the connection is “too remote,” *In re Deepwater Horizon*, 745 F.3d at 163.

Defendants’ alleged false advertising and misleading information campaigns are not “operation[s]” under OCSLA, even if those acts somehow relate to their offshore drilling. *See EP Operating Ltd. P’ship v. Placid Oil Co.*, 26 F.3d 563, 567 (5th Cir. 1994) (“The term ‘operation’ contemplate[s] the doing of some physical act on the [outer Continental Shelf].”). Nor have Defendants shown that their activity on the outer Continental Shelf was the “but-for” cause of the District’s claims. Defendants’ allegedly misleading newspaper advertisements, biased scientific studies, and misstatements about green energy gave rise to the District’s suit, and are independent of any of Defendants’ technical operations on the outer Continental Shelf. Put another way, “irrespective of Defendants’ activities on the [outer Continental Shelf],” the District’s “injuries still exist as a result of that distinct marketing conduct.” *BP P.L.C.*, 31 F.4th at 221.<sup>7</sup> Unlike cases

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<sup>7</sup> Defendants’ argument for removal under OCSLA would fail even under the Ninth Circuit’s minority approach, which does not require “but-for” causation. In *San Mateo*, that court held that any connection between the alleged injuries and the outer Continental Shelf was “too attenuated,” because the plaintiffs’ alleged injuries were “exclusively within their local jurisdictions” and none of the alleged wrongdoing occurred on the outer Continental Shelf. *San Mateo*, 32 F.4th at 754–55.

involving “direct connections” to activity on the outer Continental Shelf, such as “collision, death, personal injury, loss of wildlife, [or] toxic exposure,” the District’s suit does not present a “nexus” between its injuries and offshore operations. *Suncor*, 25 F.4th at 1273 (citing *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013)).

Defendants argue that, in the end, the District’s suit targets their extensive operations on the outer Continental Shelf. But the First, Third, Fourth, Ninth, and Tenth circuits have all rejected the argument that such a remote connection can establish jurisdiction under OCSLA. *See Shell Oil*, 35 F.4th at 59–60; *City of Hoboken*, 45 F.4th at 712; *BP P.L.C.*, 31 F.4th at 219–22; *Cnty. of San Mateo*, 32 F.4th at 751–54; *Suncor*, 25 F.4th at 1272–75. They have done so for good reason: Adopting Defendants’ approach would allow essentially any lawsuit related to fossil fuels to be removed under OCSLA. *See Shell Oil*, 35 F.4th at 60. The Court agrees that even though section 1349(b)’s jurisdictional grant is broad, removal under the provision is inappropriate because the District’s false advertising allegations under the Act “bear a weak relationship” to any activity on the outer Continental Shelf. *BP P.L.C.*, 31 F.4th at 222.

#### **E. The Federal Officer Removal Statute Does Not Apply**

Defendants argue that removal is appropriate under the federal officer removal statute. This law allows removal of a civil action against “[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof.” 28 U.S.C. § 1442(a)(1).<sup>8</sup> This statute operates as an exception to the well-pleaded complaint rule. *See Mesa v. California*, 489 U.S. 121, 136 (1989). To remove under the federal-officer removal statute, Defendants must show that they were “acting under” the direction of the federal government, that there is a “nexus” or “causal connection” between the asserted federal authority and the

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<sup>8</sup> The District does not contest that Defendants are each a “person” for purposes for § 1442.

conduct at issue, and that they can allege a “colorable” federal defense to the District’s claims. *See Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999); *Kormendi/Gardner Partners v. Surplus Acquisition Venture, LLC*, 606 F. Supp. 2d 114, 119 (D.D.C. 2009). The District does not challenge Defendants’ ability to satisfy the third requirement.

As for the first requirement, Defendants argue that through various contracts and agreements, “the federal government directed Defendants to engage in activities related to” the District’s claims, and that Defendants have “acted under the direction” of the federal government when developing fossil fuel products. ECF No. 51 at 51–52. As for the second, they say the District’s claims are sufficiently “connected or associated” with the fossil fuel activity they undertook at the behest of the federal government. *Id.* at 52.

Not so. Even if Defendants acted under the federal government’s direction “for decades,” as they say, ECF No. 51 at 65, Defendants have failed to show “a nexus” or “causal connection” between “the charged conduct and the asserted official authority.” *K&D LLC v. Trump Old Post Office, LLC*, 951 F.3d 503, 507 (D.C. Cir. 2020) (quoting *Acker*, 527 U.S. at 431).<sup>9</sup> The “charged conduct” here is Defendants’ false advertising—not fossil fuel production en masse. Put another way, the agreements between Defendants and the federal government do not require the alleged false advertising and misleading representations that gave rise to the District’s claims. *See, e.g., Shell Oil*, 35 F.4th at 53 n.6 (holding that federal-officer removal statute did not apply because the defendants’ contracts with the federal government “mandate[d] none of those activities”). True, the injuries the District’s alleges—in short, climate change—eventually trace back to fossil fuel

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<sup>9</sup> The Court expresses no view on whether Defendants’ activities related to the development of fossil fuel products qualify as actions taken “under the direction” of the federal government. The Court notes, however, that the Fourth and Tenth Circuits found that similar activity fell short of that requirement. *See BP P.L.C.*, 31 F.4th at 230–32; *Suncor*, 25 F.4th at 1250–54.

usage. But “the source of tort liability,” according to the District, is not Defendants’ production of fossil fuels but the “concealment and misrepresentation of the products’ known dangers.” *BP P.L.C.*, 31 F.4th at 233.

Thus, the Court cannot find that there is a sufficient nexus between any action Defendants may have taken under federal direction and the alleged false advertising that gave rise to the District’s claims. Removal under § 1442 is therefore unavailable to Defendants.

#### **F. The Court Does Not Have Diversity Jurisdiction Over the Parties**

Defendants contend that removal is proper because complete diversity exists between the parties. They say that the parties are diverse because the Court should consider the citizenship of the District’s citizens, who are the real parties in interest. The District argues that it sued on its own behalf to protect sovereign interests distinct from the private interests of any individual citizen. Again, the District has the better argument.

The diversity statute requires complete diversity, so all plaintiffs must be diverse from all defendants in a lawsuit. 28 U.S.C. § 1332(a); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005). Ordinarily, the “District of Columbia, like a state, is not a citizen of a state (or of itself) for diversity purposes.” *Barwood, Inc. v. District of Columbia*, 202 F.3d 290, 292 (D.C. Cir. 2000). But when a state is “merely a nominal party” rather than the true party in interest, diversity jurisdiction may exist. *Hood v. F. Hoffman-La Roche, Ltd.*, 639 F. Supp. 2d 25, 33 (D.D.C. 2009); *see also Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 461 (1980) (“A federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.”).

Both parties agree that to establish more than a “nominal interest,” the District must show a “quasi-sovereign interest” and allege an injury “to a sufficiently substantial segment of its population” rather than a discrete injury to a “group of individual residents.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). The Act itself makes clear that the

District has a “quasi-sovereign interest” in prosecuting consumer protection violations.<sup>10</sup> To begin, it authorizes the District to sue “in the public interest” generally, not on behalf of individual or discrete groups of citizens. D.C. Code § 28-3909(a). The Act also distinguishes between suits brought by the District and those brought by private citizens. For example, the District may seek civil penalties paid to the District’s treasury, while private citizens may seek only ordinary damages. *Compare* D.C. Code § 28-3903(b) *with* D.C. Code § 28-3905(k)(2). The District may also seek an injunction for violations of the Act without proving damages, which a private citizen may not do. *Compare* D.C. Code § 28-3909(a) *with* D.C. Code § 28-3905(k)(2)(D). Nor does the Act impose a statute of limitations on claims that the District may bring, but it does require a private citizen to bring similar claims within three years. *Compare* D.C. Code § 28-3909 *with* D.C. Code § 28-3905(d)(1). These distinctions make clear that the District has its own “pecuniary interest in this lawsuit” distinct from the private financial interests of individual citizens. *District of Columbia ex rel. Am. Combustion, Inc. v. Transamerica Ins. Co.*, 797 F.2d 1041, 1047 (D.C. Cir. 1986). Put another way, the District seeks redress of its own injuries and may recover for violations of the Act apart from any recovery individual citizens seek. *Cf. id.* (finding no “pecuniary interest” where state government sued but damages were awarded to private individuals).

There is also little doubt that the District’s alleged injuries affect both the District itself and a “sufficiently substantial segment of its population.” *Id.* Alleged rising sea levels, destruction of property, and other consequences of climate change fit that bill. For their part, Defendants argue

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<sup>10</sup> Other courts have recognized a state’s sovereign interest in preventing false advertising and unfair trade practices in similar circumstances. *See, e.g., Nessel ex rel. Michigan v. AmeriGas Partners*, 954 F.3d 831, 835 (6th Cir. 2020) (“The Attorney General brings this lawsuit in order to vindicate the State’s sovereign and quasi-sovereign interest in deterring Defendants from engaging in unfair trade practices . . . .”); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012) (holding that a state “has a specific, concrete interest in eliminating any deceptive practices that may have contributed to” a housing crisis).

that the District sued on behalf of a discrete group of citizens, but they do not make clear what that group is and why that group has been injured while other citizens have not.

Defendants have failed to establish that the District is merely a “nominal party” and that the Court should consider its citizens as the real parties in interest. Because the District is not diverse from Defendants, the Court therefore lacks diversity jurisdiction under § 1332.

### **G. The Class Action Fairness Act Does Not Apply**

Defendants argue that they may remove the case because it satisfies the requirements of the Class Action Fairness Act (“CAFA”). They essentially argue that the District’s suit is a class action, and the citizens of the District are the class. *See* ECF No. 51 at 72. They also say that because the District seeks “restitution and damages” for violating the Act, the District is effectively representing a class of private citizens rather than its own interests.

“CAFA provides the federal district courts with ‘original jurisdiction’ to hear a ‘class action’ if the class has more than 100 members, the parties are minimally diverse, and the ‘matter in controversy exceeds the sum or value of \$5,000,000.’” *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013) (quoting 28 U.S.C. § 1332(d)). Defendants’ arguments fall short at the first requirement: They cannot show that this is a “class action.” For reasons already discussed, the District has a sovereign interest in prosecuting consumer protection claims and may sue under the Act on its own behalf. The Act says nothing about the District suing on behalf of “class” or initiating a “class action.” Defendants’ attempt to recast the District’s suit as a class action is therefore unpersuasive, even if the suit were brought “in the public interest” generally. D.C. Code § 28-3909(a).

Other courts in this District have reached the same conclusion in a similar context. Along with suits brought by the District, the Act allows individuals to bring “private attorney general suits” where “[a] person, whether acting for the interests of itself, its members, or the general

public” may “seek[ ] relief from the use by any person of a trade practice in violation of a law of the District of Columbia.” *See* D.C. Code § 28–3905(k)(1). Courts have held that such a suit is not a class action under CAFA because it is “authorized by District of Columbia statute and is a separate and distinct procedural vehicle from a class action.” *See Breakman v. AOL LLC*, 545 F. Supp. 2d 96, 101 (D.D.C. 2008); *see also Stein v. Am. Exp. Travel Related Servs.*, 813 F. Supp. 2d 69, 73 (D.D.C. 2011) (citing *Breakman* and collecting cases). The same reasoning applies with even more force to suits brought by the District, given its sovereign interest in preventing consumer protection violations.

The cases Defendants rely on are unpersuasive. One does not relate to CAFA jurisdiction at all. *See Song v. Charter Commc’ns Inc.*, No. 17-cv-325 (JLB), 2017 WL 1149286 (S.D. Cal. Mar. 28, 2017). The other is a District of Columbia case involving a suit under the Act, but the court had no occasion to determine whether a federal court would have jurisdiction under CAFA. *See Rotunda v. Marriott Int’l, Inc.*, 123 A.3d 980, 989 (D.C. 2015). Nor did that suit involve a government-initiated enforcement suit. *See id.* At bottom, Defendants cite no authority—and the Court is aware of none—supporting the proposition that the District’s consumer protection suit constitutes a “class action” under CAFA.

#### **IV. Conclusion**

For all the above reasons, the Court will grant the District’s motion to remand. A separate order will issue.

/s/ Timothy J. Kelly  
TIMOTHY J. KELLY  
United States District Judge

Date: November 12, 2022



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA,

*Plaintiff,*

v.

EXXON MOBIL CORP. *et al.*,

*Defendants.*

Civil Action No. 20-1932 (TJK)

**ORDER**

The Court recently ordered this case remanded to the Superior Court of the District of Columbia. ECF No. 117. Defendants then moved to stay that order pending appeal. ECF Nos. 119 & 122. The Court agreed to stay its Order to permit briefing on Defendants' Motion. Minute Order of Nov. 14, 2022. Having reviewed that briefing, the Court now concludes Defendants' Motion to Stay Execution of Remand Order Pending Appeal should be denied.

The "most critical" factors courts must consider when deciding whether to stay an order pending appeal are (1) the applicant's likelihood of success on the merits and "(2) whether the applicant will be irreparably injured absent a stay." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotation omitted). The other two relevant factors are "(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding[]" and (4) where the public interest lies." *Id.* (quotation omitted). Regardless of the other factors, the Court cannot grant a stay absent irreparable harm, *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985), because the Court's power to render equitable relief depends on such "irreparable harm," *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quotation omitted).

Defendants advance two theories of irreparable harm, but both are unavailing. First, they observe that they might have to litigate simultaneously their appeal from this case and the remanded case in state court. ECF No. 122-1 at 22–23. That situation, they say, would require them to expend substantial money and effort that a successful appeal would eventually obviate. *Id.* (“Defendants are unlikely to recover . . . discovery costs . . . and the burden of having proceeded unnecessarily is unrecoverable.”). But it is well established that “money, time and energy necessarily expended in the absence of a stay,” “however substantial,” are not irreparable injuries. *Murray*, 415 U.S. at 90 (quotation omitted). So those potential harms cannot satisfy the second *Nken* factor.

Second, Defendants point out that the state court might render a final judgment on the merits, rendering their “right to appeal hollow.” ECF No. 122-1 at 21. As another district court that considered this question noted, however, that possibility is “unlikely” here. *See Mayor and City Council v. BP P.L.C.*, No. 18-cv-2357 (ELH), 2019 WL 3464667, at \*5 (D. Md. July 31, 2019). Defendants’ putative harm can materialize only if the entire litigation in the Superior Court of the District of Columbia outpaces Defendants’ appeal in this matter. Therefore, the Court cannot conclude that it is “both certain and great, actual and not theoretical, . . . and of such *imminence* that there is a clear and present need . . . to prevent irreparable harm.” *Mexichem Specialty Resins, Inc v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (citation and internal quotation marks omitted). That theory, then, does not satisfy the second *Nken* factor either.

Some district courts facing similar motions in similar cases have found irreparable injury, but this Court disagrees with their reasoning. For example, one court observed that the defendants had a statutory right to appeal and characterized the duplicative litigation as irreparable injury because it would “defeat the very purpose of permitting an appeal.” *Delaware ex. rel. Jennings v.*

*BP Am. Inc.*, No. 20-cv-1429 (LPS), 2022 WL 605822, at \*3 (D. Del. Feb. 8, 2022) (quotation omitted). But that view ignores the fact that any harm to defendants from a duplicative appeal will come in the form of money and time expended. Those harms, as the Court has explained, categorically cannot support a stay. Another court simply found a higher likelihood that a “dispositive resolution” in state court would outpace the appeal. *Minnesota ex rel. Ellison v. Am. Petrol. Inst.*, No. 20-cv-1636 (JRT/HB), 2021 WL 3711072, at \*3 (D. Minn. Aug. 20, 2021). But that mere possibility does not satisfy this Circuit’s certainty and imminence requirements for irreparable injury.

Thus, absent a demonstrated irreparable injury, this Court cannot stay its remand order while Defendants’ appeal proceeds. Defendants, however, have represented that they will “seek a stay from the D.C. Circuit” in the event this Court denies their Motion to Stay. ECF No. 122 at 2. To give them the opportunity to do so before the case is remanded to the Superior Court of the District of Columbia, the Court will continue a brief administrative stay of its remand order, ECF No. 117.

Accordingly, it is hereby **ORDERED** that Defendants’ Motion to Stay Execution of Remand Order Pending Appeal, ECF No. 122, is **DENIED**. However, the Court’s remand order will remain stayed through January 3, 2023, to provide Defendants the opportunity to seek relief in the Circuit.

**SO ORDERED.**

/s/ Timothy J. Kelly  
TIMOTHY J. KELLY  
United States District Judge

Date: December 20, 2022